UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

MERCK, SHARP & DOHME CORP.

Employer

and

Case No. 06-CA-163815

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 10-580, AFL-CIO, CLC

Charging Party

MERCK, SHARP & DOHME CORP.

Employer

and

Case No. 05-CA-168541

LOCAL 94C, INTERNATIONAL CHEMICAL WORKERS COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Charging Party

MERCK, SHARP & DOHME CORP.

Employer

and

Case No. 22-CA-168483

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 4-575, AFL-CIO, CLC

Charging Party

CHARGING PARTIES' BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Charging Parties, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 4-575 ("Local 4-575") and 10-580 ("Local 10-580"), AFL-CIO, CLC and Local 94C ("Local 94C"), International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO (collectively, "Charging Parties"), by and through counsel, Markowitz and Richman, pursuant to Section 102.46(b)(1) of the Board's Rules and Regulations submits this brief in reply to the Exceptions filed by Merck, Sharp & Dohme Corp. ("Merck", "Employer" or "Company") to the December 20, 2016 Decision and Recommended Order ("DRO") of Administrative Law Judge David I. Goldman ("ALJ"). Merck has filed an extensive set of exceptions to the ALJ's findings and conclusions and has separately moved to reopen the record to adduce evidence that it claims is relevant to what it has deemed to be a denial of due process.[1]

I. Introduction

This case arises out of the decision by Merck to give all of its employees September 4, 2015 off from work as a paid "Appreciation Day" *except* employees in the United States who were covered by a collective bargaining agreement ("covered employees"). As a result of this action, the Charging Parties filed a series of charges against Merck and ultimately a Complaint was issued against Merck. A hearing was conducted before the ALJ on October 4 and 5, 2016 in Bloomsburg, Pennsylvania.

[1] The Unions rely upon Counsel for the General Counsel's response in opposition to that motion and incorporate it herein and therefore do not respond to Section VI of Merck's brief, wherein it argues that it was denied due process.

Merck effectively admitted at the hearing that it excluded the represented employees because of activity protected by the Act—specifically the past refusal of various unions to reopen or modify collective bargaining agreements midterm. Instead, those unions insisted that the collective bargaining agreements be followed through their expiration dates, which the Act guaranteed them the right to do. Even if this admission by Merck alone would not establish a violation of the Act, a violation would nonetheless be made out under the Board's *Wright Line* framework for determining an employer's motive. Merck's decision to exclude covered employees constituted an unexplained deviation from its past practice of including such employees in company-wide grants of benefits. Moreover, Merck provided shifting, inconsistent explanations for the exclusion, and the evidence revealed all of the lawful explanations it offered to be fabrications.

In his decision, Judge Goldman found that Merck had indeed violated Section 8(a)(3) of the Act by granting unrepresented employees a paid holiday but denying the same to its unionized employees. (DRO at 19) He further found that a statement by Brian Killen ("Killen"), plant manager of the Company's Riverside, Pennsylvania to Local 10-580 president Edward Vallo ("Vallo") concerning Merck's reasons for denying the benefit to its unionized employees independently violated Section 8(a)(1) of the Act. (DRO at 20).

II. Statement of Facts

A. The Parties

Merck is a pharmaceutical company operating out of multiple locations in the United States as well as in other countries. It employs 67,000 people throughout the world (Tr. 145).[2] (DRO at 1). Of these, roughly 43,000 are outside the United States and roughly 23,000 are inside (*ibid.*). Of the U.S. employees, roughly 2,700 or 2,800 are subject to a collective bargaining agreement (*ibid.*).

Local 10-580 represents certain employees at Merck's facility in Riverside, Pennsylvania (Jt. Exh. 8 at ¶ 3), which is also referred to as the Cherokee or Danville plant (Tr. 240). Local 4-575 represents certain employees at Merck's facility in Rahway, New Jersey (Jt. Exh. 8 at ¶ 4), and Local 94C represents certain employees at Merck's facility in Elkton, Virginia (Jt. Exh. 8 at ¶ 5). Other unions represent various units at several of Respondent's locations (R. Exh. 7).

B. Merck's History of Granting Company-Wide Benefits

In recent decades, Merck has granted benefits on its own initiative to all of its employees on multiple occasions. On these occasions, Merck has granted the benefit both to employees subject to a collective bargaining agreement and to those not subject to such an agreement. Specifically, in 1990, its then-Chief Executive Officer Roy Vagelos ("Vagelos") announced that every employee would receive 100 stock options to commemorate its 100th year in existence (Tr. 35). Merck did not bargain over this change with any of its employees' bargaining representatives, nor did any representative object to this unilateral grant of benefits (*ibid.*). Then, in 1991, Vagelos announced that every employee would receive an additional 100 stock options

[2] References to the transcript of the hearing conducted in Bloomsburg, Pennsylvania on October 4 and 5, 2016 are designated as "T" followed by the page number(s) to which the Board's attention is directed. References to Joint Exhibits are designated as "J. Exh", and exhibits introduced by Merck as "R.Exh."

(Tr. 36). Again, Merck did not bargain with employee representatives nor did those representatives object to its unilateral action (*ibid.*).

In 1999, Merck, through its then-Chief Executive Officer Raymond Gilmartin, gave all employees Friday, January 2, as an additional paid day off from work (Tr. 37).[3] Thereafter, in 2006, Merck decided to make Martin Luther King, Jr. Day ("MLK Day") a paid holiday company-wide (Tr. 37-40). Merck then-Director of Labor Relations Glen Guior telephoned Vallo, who, in addition to serving as President of Local 10-580 (a position he still holds), was also the head of a council of unions that bargained with Merck over matters that applied across bargaining units (Tr. 37-38). In the call, Guior asked Vallo to request MLK day off for all employees represented by unions in the council and, when Vallo immediately complied, advised Vallo that all the employees represented by all the unions in the council would have the holiday along with every other employee at Merck (Tr. 37-40). Finally, in 2009, when January 2 again fell on a Friday, Merck again designated it as a "Company Holiday," signing agreements with its employees' unions extending the holiday to covered employees along with uncovered employees (R. Exh. 6; Tr. 137-38, 181).

In sum, the record reveals numerous incidents over a long period of time when Merck granted a company-wide benefit on its own initiative and included covered employees wholly unilaterally, without objection from collective bargaining representatives, or proposed to the representatives that represented employees be included, to which the representatives always assented.

[3] The Court Reporter mistakenly transcribed the then-Chief Executive Officer's name as "Regal Martin" instead of Raymond Gilmartin (Tr. 37).

C. Merck's Grant of an Appreciation Day to All Employees Except Covered Employees

On July 28, 2015,[4] Merck sent a message to all of its employees announcing a company-wide "additional day off in recognition of the company's performance through the midpoint of 2015" (Jt. Exh. 1), which the message's subject line referred to as "Appreciation Day" (R-3).[5] The day off was scheduled for September 4, the Friday before Labor Day (Jt. Exh. 1). Quoting Frazier, the message explained that this additional day was meant to show that Merck "value[d] and appreciate[d]" employees (*ibid.*). The message then asked employees to "note" that (1) the Appreciation Day would apply only where "local practices/laws permit, and, as required, subject to consultation with employee representatives or works councils"; (2) for facilities that already had September 4 off, another date would be found; (3) for employees who had already scheduled September 4 as a vacation day or at locations where business necessity would require operations on September 4, another day would be found; and (4) the "additional day off does not apply to those in the U.S. who are covered by a collective bargaining agreement" (*ibid.*). The message concluded by again emphasizing that the additional day off was a "special recognition" of employees' hard work and admonished the employees who would receive it to use the day to "take care of yourself, your family or your community" (*ibid.*).

Almost immediately following the announcement, employees (R. Exh. 3) and union officials (R. Exhs. 3, 4; Jt. Exhs. 2, 3) began openly and publicly criticizing the exclusion of covered employees. At the Riverside plant, employees informed Local 10-580 president Vallo that they were considering ceasing voluntarily assisting Merck with safety matters in protest (Tr.

[4] All dates referenced hereafter are in 2015 unless otherwise specified.
[5] Merck first announced the additional day off earlier on July 28 when its Chief Executive Officer, Kenneth Frazier ("Frazier"), mentioned it during a "global town hall briefing" on Merck's performance so far for the year (Tr. 149; Exh. 4). The follow-up message to employees provided more details regarding the day off (Jt. Exh. 4).

27-28). On July 31, Frazier responded to the criticisms in an e-mail to Daniel Bangert, President of United Steelworkers Local 10-86[6] ("Local 10-86"), which is the collective bargaining representative of certain employees at Merck's West Point, Pennsylvania facility (Jt. Exh. 3; R. Exh. 7). In that e-mail, Frazier asserted that Merck had excluded covered employees because "there are constraints on implementing unilateral changes – for better or worse – for employees covered by a collective bargaining agreement" (Jt. Exh. 3).

Also on July 31, Elisabeth Goggin ("Goggin"), Merck's Head of Global Labor Relations (Jt. Exh. 8), published an announcement to employees on Merck's intranet to "address comments from several of our employees in response to the 'appreciation day'" (Jt. Exh. 5; Tr. 10-11). Goggin conceded that Merck "could have been clearer in acknowledging the constraints of collective-bargaining agreements in our initial communication about 'appreciation day'" and asserted that covered employees were excluded from the day off because "[c]hanges – for better or worse – cannot be made by the Company unilaterally unless there is a provision [in the collective bargaining agreement] allowing for such changes" (Jt. Exh. 5).

In a letter addressed to Frazier dated August 21, presidents from six unions representing employees of Merck - including the Presidents of Locals 4-575, 10-580, and 94C—reminded Frazier that "[i]n the past, various types of benefits, when provided on a Company-wide basis, have always been extended to our members and employees whom our unions represent" and that "[i]n some instances, we have been asked whether we would want the benefit or time off; in other cases, we have been asked whether our organizations would object and, of course, we never have" (Jt. Exh. 6). The presidents then requested that the employees their unions represented be included in the day off and "further assure[d] the [Company] that if this paid time

[6] Local 10-86 is also referred to as "Local 10-000086" (R. Exhs. 2, 3; Jt. Exhs. 2, 3, 6, 7, 8; Tr. 10).

off is provided to our bargaining units, no grievances or charges will be filed" (*ibid.*).

Notwithstanding the August 21 letter, union-represented employees did not participate in Appreciation Day (Tr. 34).[7]

III. Argument

A. The ALJ's Conclusion that Merck Refused to Include Covered Employees in the Day Off in Retaliation for Protected Activity is Consistent with Board Precedent.

The ALJ found that that Merck's decision to exclude unionized employees from the benefit of Appreciation Day was not part of a lawful bargaining strategy, but rather was because of a straight forward desire to discriminate against those employees. (DRO at 12-13). In so finding, he relied upon the statements about Appreciation Day by top corporate executives (DRO at 13) which in essence encourage employees to blame the union, and rejected as pretextual the Respondent's claim that it was somehow barred by its bargaining obligation to provide the benefit (DRO at 13-14). As the following analysis demonstrates, the ALJ's decision was consistent with prevailing Board law and the Respondent's Exceptions to the ALJ's findings and logic are devoid of merit.

1. Evidence

At the hearing, Merck called Brian Killen, who was the Company's plant manager at the Riverside Plant throughout 2015 (Tr. 240, 286). Killen testified that he was on vacation on July 28, when Merck announced the Appreciation Day and the exclusion of covered employees, but learned about it via an e-mail from a director at the Riverside plant (Tr. 240-41). While still on

[7] The only unionized employees in the United States who received Appreciation Day were those in a unit at the Employer's Kenilworth, New Jersey location that is represented by the International Association of Machinists and Aerospace Workers, District 15, Lodge 315 (Tr. 178-79; R. Exh. 7). The Employer included these employees in Appreciation Day because their collective bargaining agreement compelled doing so *(ibid)*.

vacation, he sent an e-mail to Anthony Zingales ("Zingales"), Merck's then-Executive Director of U.S. Labor Relations (Tr. 173), requesting that Zingales hold some sort of meeting with the plant managers to discuss why covered employees would be excluded (Tr. 270-71).

A conference call between plant managers whose facilities had excluded employees as well as Zingales and other senior management officials took place on August 3, the day Killen returned from vacation (Tr. 242, 243). Initially, either Zingales or Jennifer Davis, who reports to Zingales, advised the conferees that Merck did not include covered employees because the law prohibited them from doing so unilaterally (Tr. 243). Killen, as he explained it, "clearly...knew that wouldn't [be] a sufficient response for my own information and I needed more information to go back to the site" and so asked what Merck's "intent" was and whether it would bargain with the unions regarding the day off (Tr. 243-44). When Zingales answered that Merck did not intend offer to include the unionized employees in the Appreciation Day and that the covered employees would not receive the paid day off, the plant managers asked for Merck's rationale (Tr. 244; 273-75).

Zingales responded (Tr. 265, 273) that in the recent past, when Merck wanted to make "relatively simple changes" to payroll and 401(k) and year-end holidays across the company and approached the unions about these changes in the middle of the term of a collective bargaining agreement, the unions refused to cooperate and told Merck to come back when the agreement had expired (Tr. 244, 264-65, 273). Because of this, Merck was not inclined to offer to include the employees whom the unions represented in the Appreciation Day holiday (Tr. 264-65, 275).[8]

[8] The Respondent introduced no evidence to clarify or challenge the testimony of Killen with regard to the conference call on August 3.

2. The ALJ Properly Credited Killen

Merck has excepted to the ALJ's factual finding that Merck denied the September 4 day off to "union-represented employees." *See* Merck's Statement of Exceptions at 15. In doing so, it is engaging in extreme nit-picking, asserting that what it actually stated was that the day off did not apply to United States unionized employees who were covered by collective bargaining agreements that did not require the application of the day off.

The basis for the ALJ's factual determination was the testimony of Killen, whom Merck called as its witnesses. On direct examination he testified that the "feedback" that he received from Zingales was that

> in the previous couple of years that the company had made changes to the non-collective bargaining agreement employees. You know relatively simple changes that company linked to areas like how they administer payroll and 401k and how they complete year in end holidays. So the company had made these changes for non-unionized employees, and they tried to discuss these with the union outside of contract negotiations, and the feet (sic) back from union was not in pursuit and talk to us at the next negotiations. So that was the feedback that we got when we pushed on – give us some more reasoning.

(Tr. 244).

Killen's testimony continued by recounting a meeting with Vallo, wherein he told Vallo that Merck did not intend to negotiate the holiday issue. When Vallo asked why he

> articulated the reasons that I was given, which were linked to payroll administration changes, and year-end holidays. That's what I had taken from the discussions; again, changes that had happened with the non-unionized employees but the union wouldn't discuss it in the previous period of time outside of negotiations.

(Tr. 245).

The ALJ credited Killen's testimony, citing both his demeanor and his recollection. (DDO at 6 fn.3). Additionally, he noted that Killen's disagreement with Merck's decision to

exclude the union-represented employees added to his credibility with respect to Zingales' explanation of that exclusion. (DDO at 5, lines 37-41).

Merck's quibbling with the ALJ's factual finding that it denied the holiday to non-union employees is basically an unsuccessful attempt to undermine its own witness' credibility. However, absent a "clear preponderance of all the relevant evidence" that the ALJ's acceptance of Killen's testimony was "incorrect," the Board will accept the ALJ's credibility resolution. *Standard Dray Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d (3d. Cir. 1951). Instantly there is not only a lack of a "clear preponderance" of evidence that Killen's testimony was incorrect, Merck does not offer any evidence to contradict him.

3. Killen's Testimony Means There Is No Dispute that the Employer Had an Unlawful Motive in Excluding Covered Employees

An employer that excludes union employees from a benefit granted to non-union employees because the union employees or their representatives engaged in activity protected by the Act commits an unfair labor practice. *Phelps Dodge Mining Co.*, 308 NLRB 985, 985, 995-96 (1992), *enf. denied* 22 F.3d 1493 (10th Cir. 1994). Although "the *Wright Line*[9] analysis is appropriately used in cases that turn on the employer's motive," *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 12 (2016), "the *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity," *Stahl Specialty Co.*, 364 NLRB No. 56, slip op. at 12 (2016) (citing *Phoenix Transit System*, 337 NLRB 510, 510 (2002), *enfd.* 63 Fed. Appx. 524 (D.C. Cir. 2003)). The refusal of employees or their union to reopen a contract in the middle of its term at the employer's request is "clearly protected," and the employer violates the Act if it takes an

[9] 251 NLRB 1083 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

adverse action against the employees because of that refusal. *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989).[10]

As much as it argues to the contrary in its Exceptions, Merck can hardly dispute that it denied Appreciation Day to covered employees because their bargaining representatives had refused to reopen collective bargaining agreements in the middle of their terms at Merck's request; in fact, Merck itself introduced the evidence establishing this as its motive at the hearing (Tr. 243-44, 264-65, 273-75), as noted by the ALJ (DRO at 14). The unions' refusal to renegotiate a collective bargaining agreement midterm was "clearly protected." *R.E.C.*, *supra* at 1293. Thus, "there is no dispute that the [Employer] took action against the employee[s] because the employee[s] engaged in protected concerted activity." *Stahl*, *supra*, slip op. at 12. The *Wright Line* analysis is therefore "not applicable," *ibid.*, and Merck violated the Act.

B. Uncontroverted Facts Demonstrate that the Employer's Exclusion of Covered Employees Was Unlawfully Motivated

Even assuming, *arguendo*, that Merck's admission that it excluded covered employees in retaliation for protected activity did not resolve this matter, the evidence establishes that it had an unlawful motive in taking this action.

1. Uncontested Facts

As already discussed, on multiple occasions in the past, Merck included covered employees in company-wide grants of benefits, including grants of additional paid days off (see § II.B., *supra*). On these occasions, it either granted the benefits without consulting the bargaining representatives at all or proposed to the representatives that the employees be included (*ibid.*). There is no evidence that any bargaining representative objected to a unilateral

[10] Merck's assertion that *R.E.C. Corp.* has not been cited in support of the propositions the ALJ cited, Merck brief at 23 fn.26, is meaningless in the absence of any indication that the Board has rejected its holdings.

grant of benefits or refused to agree to one (*ibid.*), nor is there any evidence of another occasion when covered employees were excluded from a company-wide grant of benefits (*ibid.*).[11]

In addition, Merck simply did not offer a consistent explanation for excluding covered employees. In Frazier's July 28 announcement and the more detailed follow-up message sent to employees later that day ("follow-up message"), Merck offered no explanation for the exclusion (Jt. Exhs. 1, 4). The follow-up message contained separate caveats that Appreciation Day would not be given where the law prohibited it and that "as required," it would be "subject to consultation with employee representatives," implying that legal bars were not the reason covered employees were excluded (Jt. Exh. 1).

Then, three days later, in response to an uproar from employees and union officials over the exclusion, Frazier and Goggin both attributed the exclusion to the Act's prohibition on unilateral changes (Jt. Exhs. 3, 5). At the hearing, however, Zingales asserted, for the first time and contrary to the statements of Frazier and Goggin, that the covered employees were excluded as part of a "bargaining strategy" related to Merck's units at Elkton and Rahway—which had recently executed long-term collective bargaining agreements at the time of the decision to exclude (Tr. 98, 201, 202))—and at West Point, where its agreement with Local 10-00086 was set to expire the following year (Jt. Exh. 7) (Tr. 178). Zingales conceded that he did not actually mention "bargaining strategy" as a reason to exclude the employees at the time he recommended doing so to Merck's top managers (Tr. 178). He also acknowledged that he learned in early July 2015 that the unions had agreed in 2009 to include their members in an additional company-wide day off on a one-time, non-precedential basis (Tr. 186; R. Exh. 6). Zingales did not elaborate on

[11] Indeed, the ALJ noted that, although he did not reach or adopt the argument that Merck had created a past practice of giving to union-represented employees benefits given to nonrepresented employees, he did make note of the numerous occasions when in fact this had occurred. (DRO at 14, n. 11).

how excluding the employees from appreciation day fit into his "bargaining strategy." And, as already discussed, Killen testified that Zingales explained the reason for the exclusion on August 3 as being because the unions did not agree to reopen their contracts midterm to accommodate Merck. According to Killen, Zingales did not mention "bargaining strategy" as a reason for the exclusion to him and the other plant managers (Tr. 243-44).

2. These Uncontroverted Facts Alone Establish a Violation Pursuant to *Wright Line*

a. *The Wright Line Framework*[12]

An employer may not extend a new benefit to unrepresented employees but not to represented employees because of "*an unlawful motive*" to discourage protected activity. *Shell Oil*, 77 NLRB 1306, 1310 (1948) (emphasis in original); *accord Sun Transport*, 340 NLRB 70, 72 (2003). Where the employer's motive is disputed, the Board utilizes the *Wright Line* framework. *E.g., Novelis Corp., supra*, slip op. at 2 n. 12. Under *Wright Line*, the General Counsel has the initial burden of "showing union activity by the employees, employer knowledge of that activity, and union animus on the part of the employer." *Advanced Life Systems*, 364 NLRB No. 117, slip op. at 2 (2015). "[P]roving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 n. 10 (2014) (emphasis in original).

[12] Merck has expressed its belief that the *Wright Line* framework is inapplicable and urges the Board to apply the approach set forth in the dissent in *Arc Bridges, Inc.* Merck brief at 20 n.24. It gives no reason to depart from *Wright Line*.

"Under *Wright Line*, if the General Counsel sustains his initial burden, the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct." *Ibid.* "However, if the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

b. The First Two Elements – Union Activity and Employer Knowledge of That Activity

As already discussed, and as noted by the ALJ (DRO at 16), multiple collective bargaining representatives had recently refused to reopen contracts midterm to accommodate certain changes to payroll, 401(k), and year-end holidays desired by Merck, which refusal was "clearly protected." *R.E.C. Corp.*, *supra* at 1293. Thus, the protected activity and knowledge elements of the General Counsel's initial burden under *Wright Line* are satisfied.

c. Factors Establishing Animus Where an Employer Grants a New Benefit to Unrepresented but Not Represented Employees

i. The Employer Makes Statements Encouraging Employees to Attribute the Exclusion to the Union

The final element—animus—is also satisfied. The Board has found evidence of animus when an employer grants a new benefit to nonunion employees but not to union employees and makes statements "essentially encourag[ing] employees to blame the Union" for the decision to withhold the new benefit from them. *Arc Bridges*, 362 NLRB No. 56, slip op. at 3-4 (2015). For instance, in *Phelps Dodge*, *supra* at 996, the Board based its finding of "clear evidence of

unlawful motivation" in part on the employer's announcement that a new wage increase program would only apply to "union-free" employees.

ii. The Exclusion Is a Departure from an Established Practice of Including Represented Employees in Similar Benefits in the Past

Of particular relevance to the present matter is that unlawful animus is also established where the employer's exclusion of represented employees is a "departure from an established practice of including represented employees" in similar benefits in the past. *Ibid.* Such a departure tends to "raise an inference of discriminatory intent," particularly if the employer is unable to advance a compelling legitimate rationale for the change in practice. *Ibid.*

iii. The Employer's Reasons for the Exclusion Are Pretextual

Furthermore, "[e]vidence that an employer's purported reasons for an action were pretextual—that is, either false or not in fact relied upon—supports a finding that the action at issue was discriminatorily motivated." *Arc Bridges*, *supra*, slip op. at 4 (internal brackets and quotations omitted). When it comes to establishing pretext, "[t]he Board has held that when…an employer provides inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive." *Inter-Disciplinary Advantage, Inc.* 349 NLRB 480, 506 (2007), and cited cases. Furthermore, if an employer's explanations are "improbabl[e] or inadequa[te]," this too "invites the suspicion that the Respondent was trying to conceal a darker underlying motive for" excluding represented employees from a company-wide benefit. *Phelps Dodge*, *supra* at 996-98 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). For instance, where an employer asserted that it granted a benefit only to non-union employees because it was "not prepared to extend the quarterly payments to union-represented employees while their current labor

agreements were still in effect," but "such considerations had never prevented the [employer] in the past from conferring such payments on union-represented employees," the Board inferred that the employer's assertion was pretextual. *Id.* at 997.

d. Application of These Factors to Merck's Exclusion of Covered Employees From Appreciation Day Establishes Animus

Here, as found by the ALJ, the uncontroverted evidence demonstrates that Merck's exclusion of covered employees was unlawfully motivated and that its proffered lawful reasons for the exclusion were pretextual. (DRO at 14). Therefore, an unlawful motive was established under *Wright Line* without proceeding to the second step of that analysis, which is to consider whether the employer has shown that it would have taken the same action even absent the employees' protected activity. *Golden State*, *supra* at 385.

i. Merck's Announcement of Appreciation Day Encouraged Employees to Blame the Union for the Exclusion

Merck's follow-up message to employees on July 28 detailing Appreciation Day overtly indicated that it favored nonunion over union employees, thereby "encouraging employees to blame the Union" for the exclusion. *Arc Bridges*, *supra*, slip op. at 3-4. The announcement, sent to all employees worldwide, emphasized that the additional day off was meant to show Merck's appreciation and high estimation of the employees. In the midst of this praise, Merck stated, without any explanation, that the additional day off "does not apply to those in the U.S. who are covered by a collective bargaining agreement" (Jt. Exh. 1). The announcement makes clear that covered employees are the only group in the entire corporation to be excluded (*ibid.*). To the employees reading it, the import of this message would have been unmistakable: Merck does not

"value and appreciate" union employees.[13] Such a message constitutes powerful evidence of an unlawful motivation. *See Arc Bridges*, *supra*, slip op. at 3; *Phelps Dodge*, *supra* at 996.

ii. Merck's Exclusion of Covered Employees Was a Clear Departure from Longstanding Practice

Furthermore, Merck's withholding of Appreciation Day from represented employees was a "departure" from its practice of including represented employees in additional days off and other new benefits. *Phelps Dodge*, *supra* at 996. Such a departure "will raise an inference of discriminatory intent," particularly when the employer offers no compelling legitimate reason to explain the change. *Ibid.* Prior to the present incident, Merck had *always* offered any company-wide additional day off or other similar benefit, such as stock options, to covered and non-covered employees alike. Now, for the first time in its history, it excluded covered employees from an additional day off. "[A]gainst this tradition, one reasonably looks to the Respondent for some clear, 'union-neutral' explanation for its...decision to exclude union-represented employees from the new [p]rogram." *Ibid.* But, as discussed below, the only lawful explanations offered by Merck to explain its abrupt change from past practice are plainly pretextual, leaving the inference of discriminatory intent unchecked.

iii. Merck's Proffered Lawful Explanations for the Exclusion Were Pretextual

Merck's proffered lawful explanations for the withholding are pretextual. Those explanations have shifted and have not been consistent. Thus, it initially gave no explanation while implying that legal prohibitions were the reason covered employees were excluded by addressing legal prohibitions in a separate caveat (Jt. Exhs. 1, 4). Then, in response to criticism, it claimed that it excluded the employees because of the legal prohibition against unilateral

[13] Indeed, multiple employees, as well as union officials, read the announcement to mean exactly that, as evidenced by the criticisms the announcement prompted (R. Exhs. 3, 4; Jt. Exhs. 2, 3; Tr. 27-28).

changes (Jt. Exhs. 3, 5). At the hearing, Zingales, Merck's head of labor relations in the United States, posited for the first time that the decision to exclude was part of "bargaining strategy" at Rahway, Elkton, and West Point, despite conceding that he did not mention "bargaining strategy" when recommending the exclusion to Merck's top managers and despite Killen's uncontroverted testimony that Zingales did not mention "bargaining strategy" when explaining the exclusion to plant managers either (Tr. 178, 243-44). Moreover, Zingales apparently told plant managers in the August 3 conference call that the Company was excluding employees because the unions had been uncooperative in making midterm modifications to the contracts (Tr. 244, 264-65, 273). These "inconsistent or shifting reasons" provided by Merck for the exclusion give rise to "a reasonable inference...that the reasons proffered are mere pretexts designed to mask an unlawful motive." *Inter-Disciplinary Advantage, supra* at 506.

In addition to being shifting and inconsistent, Merck's proffered lawful explanations are improbable and inadequate, further supporting the inference that they are pretexts. Merck first sought to explain itself on July 31 through Frazier and Goggin, who claimed that the employees were excluded because of the Act's prohibition on unilateral changes (Jt. Exh. 3, 5). However, throughout its entire history the Company had included union employees in every new benefit other than Appreciation Day, despite being under the exact same purported legal constraints. To ensure compliance with the law, Merck typically asked for the unions' assent before including represented employees in the new benefit, which the unions always readily gave.[14] There is no reason that the Company could not have done the same thing for Appreciation Day.

[14] When it offered stock options to its employees, Merck was so confident that the unions would not object that it did not even consult them before including represented employees (Tr. 35-36). Its prediction ultimately proved correct, as no union objected. (*ibid.*).

Merck argues that the ALJ erred in rejecting as pretextual its assertion that it could not legally offer the extra holiday to the unionized employees. Merck Brief at 36-38. The issue, of course, is not whether Merck could legally grant the benefit but rather what its motive was in denying it to its unionized U.S. facilities. As the ALJ noted, Merck's own notice contemplated the possibility of "consultation with employees representatives or works councils," the very same "consultation" that Merck had employed in the past, when it included its represented facilities among those who received new, mid-contractual benefits. (DRO at 14, n. 11). Having previously provided such benefits unilaterally, its claim that it could not do so legally thus rang hollow and was correctly rejected by the ALJ as pretextual. *See Arc Bridges, supra*, 362 NLRB No. 56 at 5 n.18 (employer could have avoided 8(a)(5) by asking union for permission to grant wage increase). (DRO at 14). Thus, Merck's false claim that the legal prohibition on unilateral changes caused it to exclude covered employees from Appreciation Day "invites the suspicion that the [Employer] was trying to conceal a darker underlying motive for" excluding the employees.[15] *Phelps Dodge*, *supra* at 996-98

Furthermore, even making the improbable assumption that Merck harbored serious doubts that the unions would permit the inclusion of covered employees in Appreciation Day, the unions expressly granted it permission to do so via a letter to Frazier on August 21, at a time when the Company could still have included them (Jt. Exh. 6). It is clear, then, that Merck did not actually exclude union employees because the law prohibited it from including them. Merck's claim that it had no legal choice but to withhold the benefit is therefore "pretextual,"

[15] In fact, Merck's own plant manager, Killen, recognized the improbability and inadequacy of the company's claim that it could not include covered employees because of the legal prohibition on unilateral changes (Tr. 243-44). As Killen explained his reaction to hearing this explanation, "clearly I knew that wouldn't [be] a sufficient response for my own information and I needed more information to go back to the site" *(ibid)*.

"support[ing] a finding that the action at issue was discriminatorily motivated." *Phelps Dodge*, *supra* at 996.

The new explanation for the exclusion offered by Zingales for the first time at hearing, that the exclusion was related to "bargaining strategy" at Rahway, Elkton, and West Point, is equally improbable and inadequate. Merck had just negotiated a new collective bargaining agreement with Local 4-575, effective on May 1, 2015 that was to last through April 2023, so there would be no bargaining at Rahway for eight years (Tr. 201). Similarly, at Elkton, the parties had concluded an agreement in 2014 that would be effective through April 30, 2018, close to three years after Appreciation Day (Tr. 202). Zingales's conclusory statement that the exclusion was part of "bargaining strategy" for these locations is therefore, as the ALJ found, incredible. (DRO at 16). Although the negotiations at West Point between Merck and Local 10-00086 were to commence sooner, since the contract there was to expire at the end of April, 2016 (Jt. Exh. 7), they were still almost a year away.

In any event, Zingales was aware in early July that when Merck sought to give a company-wide additional day off the last time, in 2009, the unions all agreed that it would be granted on a one-time, non-precedential basis, alleviating any concerns about the benefit's impact on bargaining (Tr. 186; R. Exh. 8). The same could have been done here, further demonstrating the implausibility of Zingales's "bargaining strategy" explanation.[16] Finally, and perhaps most glaringly, Zingales's "bargaining strategy" explanation is improbable because, as Zingales concedes, he did not mention it to Merck's top management when he recommended that they exclude covered employees (Tr. 178). If Zingales in fact relied on "bargaining strategy" for

[16] Moreover, Zingales's repeated conclusory assertions that the exclusion was part of Merck's "bargaining strategy" – a phrase appearing in the leading cases to describe a legitimate reason to discriminate between union and nonunion employees with regard to a new benefit – without any explanation about how the exclusion fit into that strategy, suggests that Zingales was attempting to cover up Merck's true motive using an exculpatory legal phrase.

his recommendation, he surely would have said so. Thus, the ALJ's discrediting of Zingales's explanation (DRO at 16) is well supported by the record.

In sum, uncontroverted evidence demonstrates "union activity by the employees, [Employer] knowledge of that activity, and union animus on the part of the [Employer]." *Advanced Life Systems*, *supra*, slip op. at 2. Moreover, because the uncontroverted evidence "establishes that the reasons given for the [Employer's] action are pretextual—that is, either false or not in fact relied upon—the [Employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, *supra* at 385. The ALJ thus correctly concluded that the Employer therefore violated the Act.

C. Killen's Comments to Vallo Violated Section 8(a)(1)

In his direct testimony, elicited by Merck's counsel, Killen stated that when Vallo asked him why Merck was denying the extra vacation day to its U.S. unionized employees, he informed Vallo that it was due to the unions' past refusals to allow minor deviations from existing contracts. That explanation, presumably accurate, sent a message to Vallo that if the unions were not amenable to Merck's desire to alter contractual limitations, there would be retaliation. In that regard, it differs from *Fiesta Hotel Corporation d/b/a Palms Hotel and Casino*, 344 NLRB 1363 (2005), cited by Merck at page 30 of its brief, where the allegedly violative remarks were devoid of any threats.

Here, Killen's explanation of why Merck had retaliated against the unions constituted a clear and unambiguous threat that any future obstructionism by the unions would result in further retaliation by Merck. Unlike *FCJ Security Services, Inc.*, Case No. 22-RD-83707, 2013 WL 2642895 (N.L.R.B. Div. of Judges June 12, 2013), also cited by Merck, Killen was not merely

voicing his opinion but was informing Vallo of the actual, discriminatory reason for Merck's denial of appreciation day to its unionized workforce. In doing so, he violated Section 8(a)(1) of the Act. *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 2 n. 3 (2015) (manager's statements to unit employees that they were losing standard benefits "because of their union contract" but that non-unionized employees would retain a form of the benefit violates 8(a)(1).

D. The ALJ's Remedy

Merck asserts that the ALJ's remedy is unlawful "because it is overbroad, not supported by the record evidence and interferes with the Company's rights under Section 8(d)." Merck brief at 46. It wrongly claims that there is no record evidence that the Unions refused to agree to its proposed mid-term modifications and were thereafter the target of retaliation. That claim, of course, is directly in conflict with Killen's testimony to the contrary. Its argument that there is no evidence that any union considered the Company's action "to be for the purpose of discouraging membership in their organization," *id.*, is unavailing as the issue is whether that action was discriminatory, not whether the Union "considered" its purpose.

It next claims that the Order covers union-represented employees outside of the United States who may have been denied the paid day off "for reasons unrelated to those identified in the Decision." *Id.* at 47. If that is the case, the Company can raise the issue in a compliance hearing.

Its final, and principal, argument is that the Order improperly grants to employees a benefit that it never negotiated, thereby violating the limitations recognized by the Supreme Court in *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). There, the Court held that the Board could not order an employer to include in a contract a particular proposal in the context of an 8(a)(5) proceeding. The problem with Merck's argument is that this is an 8(a)(3) proceeding

where the normal remedy is a make-whole order. Thus, in *Arc Bridges, supra*, the remedy for the employer's discriminatory withholding of a wage increase from unionized employees while granting it to non-unionized employees was an order to cease and desist from withholding wage increases or otherwise discriminating against bargaining unit employees and to "reimburse each of the affected employees for the increase they would have received… had the increase been granted to them in the manner that it was granted to the Respondent's unrepresented employees." 362 NLRB No. 56 at 5. Just as the *Arc Bridges* employees were entitled to back pay, Merck's unionized employees are entitled to the paid appreciation day.

IV. Conclusion

For all of the reasons set forth above, the Unions respectfully request that Merck's exceptions be denied and that the ALJ's Recommended Decision and Order be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2017, true and correct copies of the Charging Parties' Brief in Opposition to the Exceptions of the Respondent to the decision of the Administrative Law Judge were served by electronic mail upon:

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